Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JESSE FULK and DONALD CEARLOCK,

Petitioners,

v.

UNITED TRANSPORTATION UNION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the appropriate degree of deference which should be extended to a labor union with respect to questions involving the interpretation of its constitution?

2. Should the federal courts defer to a labor union's interpretation of its constitution when that interpretation is contrary to the plain meaning of the text of the constitution even if that interpretation serves an objective which its officials believe is worthy?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

The Petitioners are Jesse Fulk and Donald Cearlock.

The Respondent is the United Transportation Union.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

INTRODUCTION 9

THE COURT OF APPEALS EFFECTIVELY SANCTIONED A LABOR UNION'S ACTIONS IN DISREGARDING THE PROVISIONS OF ITS CONSTITUTION 16

CONCLUSION 22

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases:

PAGE(S)

Air Wisconsin Pilots Protection Committee v. Sanderson, 909 F.2d 213 (7th Cir. 1990) .. 12

Allen v. United Transportation Union, 964 F.2d 818 (8th Cir. 1992) 13

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2

Department of Labor v. Aluminum, Brick and Glass Workers International Union, 941 F.2d 1172 (11th Cir. 1991) 13

Dole v. United Automobile, Aerospace and Agricultural Implement Workers of America, 970 F.2d 1562 (6th Cir. 1992) .. 13, 14

Dow v. United Brotherhood of Carpenters and Joiners of America, 1 F.3d 56 (1st Cir. 1993) 12, 13

Felton v. Ullman, 629 F.Supp. 25 (S.D.N.Y. 1986) 13

Frisch v. District Council No. 9, Brotherhood of Painters, 493 F.2d 1061 (2nd Cir. 1974) ... 12

Local No. 48 United Brotherhood of Carpenters and Joiners of America v. United Brotherhood of Carpenters and Joiners of America, 920 F.2d 1047 (1st Cir. 1990) 12

Local 317 National Post Office Mail Handlers, Watchmen, Messengers, and Group Leaders Division of the Laborer's v. National Post Office Mail Handlers, 696 F.2d 1300 (11th Cir. 1983) 14

Local 1052 United Brotherhood of Carpenters and Joiners of America v. Los Angeles County District Council of Carpenters, 944 F.2d 610 (9th Cir. 1991) 15

Maher v. International Brotherhood of Electrical Workers, 15 F.3d 711 (7th Cir. 1994) 14

Martin v. Radio-Electronics Officers' Union, 813 F.Supp. 878 (D.D.C. 1993) 12

Mason Tenders Local Union 59 v. Laborers' International Union of North America, 924 F.Supp. 528 (S.D.N.Y. 1996) 12

Millwright Local Union No. 1079 v. International Brotherhood of Carpenters and Joiners of America, 878 F.2d 960 (6th Cir. 1989) 13

Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984) 12

Motion Picture & Video Tape Editors Guild, Local 776 v. International Sound Technicians, Local 695, 800 F.2d 973 (9th Cir. 1986) 14

Newell v. International Brotherhood of Electrical Workers, 789 F.2d 1186 (5th Cir. 1986) 12

O'Neill v. Airline Pilots Association, International, 939 F.2d 1199 (5th Cir. 1991) 14

Papianni v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 11, 622 F.Supp. 1559 (D.C.N.J. 1985) 12, 13

Plumbers Local 334 v. Plumbers International Union, 669 F.2d 129 (3rd Cir. 1982) 12

Reich v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, 32 F.3d 512 (11th Cir. 1994) 15

Rogers v. Lucassen, 777 F.Supp. 997 (D.D.C. 1991) 12

Schonfeld v. Raftery, 359 F.Supp. 380 (S.D.N.Y. 1973) 12

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991) 18

Teamsters v. Terry, 494 U.S. 558 (1990) 18

Teamsters Joint Council No. 42 v. International Brotherhood of Teamsters, 82 F.3d 303 (9th Cir. 1996) 15

United Brotherhood of Carpenters and Joiners of America, Local Union No. 267 v. United Brotherhood of Carpenters and Joiners of America, South Central Ohio District Council, 992 F.2d 1418 (6th Cir. 1993) 13

United States v. International Union of Petroleum and Industrial Workers, 870 F.2d 1450 (9th Cir. 1989) 12

United States v. International Brotherhood of Teamsters, 743 F.Supp. 155 (S.D.N.Y. 1990) 12

Wooddell v. International Brotherhood of Electrical Workers, Local 71, 502 U.S. 93 (1991) 11

Constitutional Provisions, Statutes and Rules:

Rule 56(c) of the Federal Rules of Civil Procedure 2

28 United States Code §1254 2

28 United States Code §1291 1

§301 of the "Labor-Management Relations Act of 1947" [29 U.S.C. Section 185] 1, 11

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, JESSE FULK and DONALD CEARLOCK, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled proceeding on November 12, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 160 F.3d 405 (7th Cir. 1998) and is reprinted in the appendix to this petition beginning at App. 1.

The decision and opinion of the United States District Court for the Central District of Illinois is published at 995 F. Supp. 937 and is reprinted in the appendix to this petition beginning at App. 9.

JURISDICTION

The Petitioners invoked the jurisdiction of the District Court relying upon §301 of the "Labor-Management Relations Act of 1947" [29 U.S.C. Section 185]. On March 4, 1998 the District Court granted the Respondent's motion for summary judgment.

The Court of Appeals for the Seventh Circuit had jurisdiction of this case under 28 United States Code §1291. On November 12, 1998 the Court of Appeals entered a judgment and opinion affirming the judgment of the District Court. In its opinion it held that the Respondent was entitled to summary judgement because its actions were in furtherance of a reasonable

interpretation of its constitution. In this respect it concluded that: 1) the Respondent's characterization of the collective bargaining proposal as a "hybrid agreement" was reasonable; and 2) the Respondent's actions in permitting the collective bargaining proposal to be ratified by sub-majorities was not unreasonable.

On February 12, 1999 the Court of Appeals denied Petitioners' request for rehearing en banc (App. 18).

This Court has jurisdiction to review this case under 28 United States Code §1254.

STATEMENT OF THE CASE

This case was decided by the District Court on a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of a genuine dispute of fact on an element essential to his case and upon which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In the fall of 1991 the Petitioners were craft employees of the Norfolk & Western Railway Company ["RAILWAY"] and members of the Respondent. Within the operating system of the RAILWAY were a series of geographic units commonly referred to as seniority districts. The number of employees working within each seniority district varied depending upon the workforce needs of the RAILWAY to carry on its business in that particular territory. The Petitioners worked in the Springfield District.

The Respondent was the collective bargaining representative of conductors, brakemen and yardmen em-

ployed by the RAILWAY. In 1991 and for many years prior to that time it was organized through a series of subdivisions known as general committees of adjustment. Among these was the General Committee of Adjustment for Norfolk Southern Corporation, N&W Railway, Wabash District ["COMMITTEE"]. The COMMITTEE represented employees of the RAILWAY who worked on the territory of the former Wabash Railroad Company.

In September of 1984 the RAILWAY and the Respondent entered into a crew consist agreement covering the conductor, brakemen and yardman crafts who worked throughout the entire operating system of the RAILWAY. The agreement anticipated a reduction in the size of train crews resulting from attrition in the RAILWAY's work force. Under its terms, as craft members left its employ the RAILWAY was not required to fill their vacated positions and was permitted because of the resulting work force reduction to assign as few as one brakeman and one conductor to a train.

The Agreement also created the productivity fund which was a device that allowed craft employees to share in 50% of the savings derived by the RAILWAY from operating trains with reduced crews.

At the close of each fiscal year the RAILWAY made a payment to its craft employees of their share of the savings realized through the year through the operation of trains with reduced crews.

In apportioning the productivity fund proceeds among the RAILWAY's work force consideration was given to the number of times in each seniority district the RAILWAY operated trains with reduced crews. An account-

ing system was created as a means for tracking within each seniority district when trains operated with reduced crews. The purpose of this system was to determine the money employees within each seniority district might receive through the productivity fund based upon the number of times within their seniority district the RAILWAY operated a train with a reduced crew.

The productivity fund arrangement applied uniformly throughout the entire operating system of the RAILWAY. The RAILWAY eagerly embraced the productivity fund arrangement and utilized it whenever it could throughout its entire operating system. The practice of the RAILWAY in operating trains with reduced crews was generally consistent and uniform among the various seniority districts.

In 1991 the Respondent and the RAILWAY negotiated modifications to the crew consist arrangement. It was the desire of the RAILWAY to operate trains with a one person crew so long as existing craft employees were not involuntarily displaced. It proposed that when there was a sufficient reduction in the work force within a seniority district through attrition the RAILWAY be permitted to operate trains with a one person crew instead of hiring replacement employees. It also proposed abolishing the productivity fund. In exchange for being relieved of any future financial liability through the productivity fund arrangement when operating trains with reduced crews it offered to pay each existing craft employee a total of $60,000.00. This payout proposal was contingent upon the Respondent's acceptance of the RAILWAY's modifications in the crew consist agreement.

The Respondent's officials reacted to the RAILWAY's proposal by suggesting that employees who were about to separate from employment with the RAILWAY receive a lesser share of the productivity fund buyout than its members who would continue to work for it. The RAILWAY was not receptive to that suggestion and remained steadfast in its proposal to pay the same amount to each craft employee.

In November of 1991 the two proposals of the RAILWAY were submitted by the Respondent to a vote of the crafts covered under the jurisdiction of the COMMITTEE. Each proposal was to be voted upon separately by the Respondent's membership.

The General Chairman of the COMMITTEE opposed the RAILWAY's productivity fund buyout proposal and communicated his thoughts in that respect through a cover letter to craft members at the time he forwarded the ballots.

When the ballots were returned to the COMMITTEE from craft members throughout the system who worked within its jurisdiction they were tabulated differently.

The votes of all craft members within the jurisdiction of the COMMITTEE were counted together with respect to the crew consist proposal. Under that tabulation method the proposal carried. The productivity fund proposal, however, was not tabulated on the basis of the total votes throughout the jurisdiction of the COMMITTEE. Instead, the ballots were counted and the results determined separately on the basis of the vote within each seniority district.

The decision to have the productivity fund buyout proposal tabulated on the basis of the vote of individual

seniority districts rather than by the membership as a whole was not the result of any negotiation or agreement with the RAILWAY nor was it at the instance of the RAILWAY. Instead, it was the idea of the Respondent's officials.

A total of 600 votes were cast on the productivity fund buyout proposal by the membership within the entire COMMITTEE. Approximately two-thirds of the members voted in favor of the proposal.

However, within the Springfield District the proposal was defeated by one vote.

Article 85 of the Respondent's constitution provides a mechanism for collective bargaining proposals to be ratified by members within a General Committee of Adjustment. With respect to the ratification of a system agreement it provides in pertinent part as follows:

> "The General Chairperson must poll the entire membership holding seniority and working in the craft involved on the property by mail referendum ballot prior to signing any system agreements and be governed by the majority of the votes cast."[1]

Under its constitution the COMMITTEE did not have the authority to interpret the laws and constitution of the Respondent. That power under Article 16 of its constitution was reserved to the International President subject to appeal to the Respondent's Board of Directors. Under Article 38 of the constitution only the Inter-

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[1] The term "system agreement" is not defined in the constitution. According to the COMMITTEE's General Chairperson it is an agreement which applies to the entire area encompassed by the COMMITTEE.

national President of the Respondent with the approval of its Board of Directors could take action to meet situations not covered under its constitution.

Upon discovering the manner in which the vote on the productivity fund proposal was counted the Petitioners wrote a letter to the President of the Respondent on December 9, 1991 protesting the constitutionality of the manner in which the vote on the productivity buyout proposal was tabulated. On December 20, 1991 the President of the Respondent in a letter to the Petitioners characterized the productivity fund buyout proposal as a system agreement and pointed out that within their seniority district it was not approved by both crafts.

The Petitioners in their complaint claim that the Respondent denied them rights secured by the constitution contending that the manner in which the productivity buyout proposal was tabulated was contrary to its requirements. Specifically, they contend that under Article 85 of the constitution the vote should have been decided on the basis of the total vote of all members voting on the buyout proposition rather than on the basis of the separate votes of each seniority district.

The Respondent moved for summary judgment before the District Court with respect to the Petitioners' claim arguing that its conduct was consistent with its constitutional obligation to them. In this respect it asserted that the actions of its officials were an outgrowth of a reasonable interpretation of its constitution and the District Court must defer to that interpretation.

The District Court viewed the issue in dispute to turn upon the correct interpretation which should be given

to Article 85 of the Respondent's constitution. It concluded that the Respondent's interpretation given the factual context of the case was not unreasonable and thus it was obliged to defer to that interpretation. In reaching that conclusion it relied upon several considerations. First, it recognized that the portion of Article 85 relied upon by the Petitioners related to the ratification of a "system agreement". It was not convinced that the Petitioners had established that the productivity buyout proposal represented a system agreement. Second, it concluded that the voting method was the product of agreements reached between the RAILWAY and the Respondent and thus the concerns of the Petitioners were more properly directed toward the terms of the arrangement rather than with the procedure employed to adopt it. Third, it concluded that Article 85 could be reasonably construed to permit district by district voting and a general chairman need reasonably do no more than submit system agreements to "some sort of majority vote" in which every member of the Respondent is allowed to participate. Finally, it concluded that the framers of the Respondent's constitution probably did not intend for Article 85 to be applied as rigidly as the Petitioners contend. Noting that the constitution does not mention productivity funds the District Court surmised that its authors probably never anticipated the kind of district-specific agreement which was at issue in the case.

The Court of Appeals affirmed the decision of the District Court. It recognized that in a dispute concerning the meaning of a labor union's constitution it would defer to the union's interpretation so long as the interpretation is not unreasonable or even "patently unrea-

sonable". In concluding that the Respondent's actions were in furtherance of a reasonable interpretation of its constitution it made two determinations. First, it adopted the Respondent's argument that the productivity buyout fund proposal was not a "system agreement" subject to ratification under Article 85 of its constitution, but was instead a "hybrid agreement" incorporating elements of both a system agreement and a local agreement. In this respect it found no provision in the constitution limiting collective bargaining agreements to either system or local agreements although the constitution mentions only those two types. Second, it concluded that Article 85 is ambiguous in terms of the meaning of the term "majority" and concluded that because of the variations in the value of the productivity funds from district to district it could not be said that the Respondent's interpretation of its constitution was unreasonable.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

It is a well established policy in the administration of the federal labor laws that judicial intrusions into the internal affairs of labor unions be limited. This policy is predicated upon a recognition that courts have neither a monopoly on fairness nor a sufficient expertise in the administration of labor organizations to warrant a pervasive judicial involvement in internal union affairs.

This petition raises the question of what limits should be placed upon that policy when courts are called upon to review the interpretation a labor union gives to

agreements and compacts dealing with its internal government. Specifically, it addresses the issue of whether a member of a labor union may successfully challenge in the federal courts the actions of its officials when those actions conflict with the clear meaning of a provision in its constitution even though that interpretation might serve an objective which the union's officials believe is worthy.

In this case the actions of the Respondent's officials in adopting an arrangement for tabulating the votes on the productivity fund buyout proposal were wrong in two respects. First, the method they employed is clearly contrary to the provisions of Article 85 of the Respondent's constitution if the productivity fund buyout proposal constitutes a "system agreement". Second, to the extent that the productivity fund buyout proposal was not a "system agreement" but was instead a "hybrid agreement" as the Respondent suggests then under the terms of its constitution the President and Board of Directors of the Respondent rather than its general chairman should have prescribed the manner in which the ratification vote would be tabulated. Hence, the actions of its officials in establishing the ratification method were ultra vires.

If this Court grants the writ it presumably will better define the scope of the deference federal courts give to labor unions in interpreting their internal government compacts. In so doing it will balance and resolve a tension between two sometimes competitive and conflicting principles. The first is the interest of labor unions in controlling their internal affairs with minimal judicial oversight. The second is the right of a union member to expect that its activities will be administered in ac-

cordance with the rule of law as embodied in its constitution and by-laws. A labor union's constitution is considered a contract and the jurisdiction of the federal courts under §301 of the "Labor Management Relations Act of 1947" [29 U.S.C. §185] has been extended to permit district courts to consider claims against a labor union by its members when its conduct violates its constitution [*Wooddell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93 (1991)]. Unlimited deference by the federal courts to a labor union's interpretation of its constitution and by-laws would effectively render the right of a union member to challenge conduct which is contrary to its constitution illusory.

The Petitioners do not suggest that federal courts decline giving deference to the democratically elected officials of labor unions in conducting and overseeing their internal affairs, but instead urge that uniform and sensible limits be placed on that deference to insure that the affairs of labor unions will be undertaken consistent with the terms of their constitutions and bylaws even when their officials have misgivings about the end which will result from following constitutional procedure.

While the federal courts have been unanimous in endorsing a deferential policy toward labor unions in conducting their internal affairs the degree of deference given to labor unions in interpreting their bylaws and constitutions has not been consistent.

On the one hand several courts have adopted the view that deference must be given to the interpretation given by a labor union to its constitution unless that interpre-

tation is patently unreasonable.[2] Several other courts have taken a less deferential approach and have deferred to a labor union's interpretation of its constitution if that interpretation was reasonable.[3] Still others have deferred to a labor union's interpretation of its constitution so long as that interpretation is reasonable and made in good faith.[4]

One court has adopted a policy of deferring to a Union's interpretation of its constitution provided that interpretation is reasonable, made in good faith and not

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[2] [*Local No. 48 United Brotherhood of Carpenters and Joiners of America v. United Brotherhood of Carpenters and Joiners of America*, 920 F.2d 1047, 1051-1052 (1st Cir. 1990); *Dow v. United Brotherhood of Carpenters and Joiners of America*, 1 F.3d 56, 58 (1st Cir. 1993); *Mason Tenders Local Union 59 v. Laborers' International Union of North America*, 924 F.Supp. 528, 543 (S.D.N.Y. 1996); *Plumbers Local 334 v. Plumbers International Union*, 669 F.2d 129, 131 (3rd Cir. 1982); *Papianni v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 11*, 622 F.Supp. 1559, 1567 (D.C. N.J. 1985); *Newell v. International Brotherhood of Electrical Workers*, 789 F. 2d 1186, 1189 (5th Cir. 1986); and *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990)].

[3] [See *Schonfeld v. Raftery*, 359 F.Supp. 380, 388 (S.D.N.Y. 1973); *Frisch v. District Council No. 9, Brotherhood of Painters*, 493 F.2d 1061 (2nd Cir. 1974); and *United States v. International Brotherhood of Teamsters*, 743 F.Supp. 155, 162 (S.D.N.Y. 1990)].

[4] [*Monzillo v. Biller*, 735 F.2d 1456 (D.C. Cir. 1984); *Martin v. Radio-Electronics Officers' Union*, 813 F.Supp. 878, 881 (D.D.C. 1993); *Rogers v. Lucassen*, 777 F.Supp. 997, 999 (D.D.C. 1991); and *United States v. International Union of Petroleum and Industrial Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989)].

contrary to the language of the constitution[5] while other courts have established a policy of deference to a labor union's interpretation of its constitution provided that interpretation is both fair and reasonable.[6]

Moreover, the federal courts have applied a variety of differing approaches to determine whether a labor union's interpretation of its governing documents was of sufficient reasonableness to warrant judicial deference.

The First Circuit has determined that a labor union's interpretation of its constitution is not patently unreasonable if it is plausible, not a product of bad faith, facially sufficient or grounded in arguable authority [*Dow v. United Brotherhood of Carpenters and Joiners of America*, supra at p. 58]. In *Felton v. Ullman*, 629 F.Supp. 251, 255 (S.D.N.Y. 1986), the test employed by the district court for determining whether a labor union's interpretation was unfair or unreasonable was whether it was supported by "arguable authority". In *Papianni v. International Association of Bridge, Structural and Ornamental Iron Workers* (supra at pp. 1567-

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[5] [*Allen v. United Transportation Union*, 964 F.2d 818, 821 (8th Cir. 1992)].

[6] [*Department of Labor v. Aluminum, Brick and Glass Workers International Union*, 941 F.2d 1172, 1177 (11th Cir. 1991); *United Brotherhood of Carpenters and Joiners of America, Local Union No. 267 v. United Brotherhood of Carpenters and Joiners of America, South Central Ohio District Council*, 992 F.2d 1418, 1423-1424 (6th Cir. 1993); *Millwright Local Union No. 1079 v. International Brotherhood of Carpenters and Joiners of America*, 878 F.2d 960, 962 and 965 (6th Cir. 1989); and *Dole v. United Automobile, Aerospace and Agricultural Implement Workers of America*, 970 F.2d 1562, 1566 (6th Cir. 1992)].

1568, 1570) the test employed for determining whether the union's interpretation was patently unreasonably was whether it was illogical, impermissible or foreclosed by law or unlawful discriminatory motive. Other courts have employed a standard for determining whether a labor union's interpretation of its constitution was patently unreasonable based upon whether it acted in bad faith.[7]

Some courts have suggested that a labor union's interpretation will be considered fair and reasonable if its position is supported by the text of the constitution.[8] In furtherance of this view at least one court has interpreted the test of reasonableness as whether the union's interpretation is a fair interpretation of the words and provisions contained in its constitution rather than whether it would be fair and reasonable for its constitution to provide the end sought by the union through its interpretation [*Local 317 National Post Office Mail Handlers, Watchmen, Messengers, and Group Leaders Division of the Laborer's, etc. v. National Post Office Mail Handlers, etc.*, 696 F.2d 1300, 1302 (11th Cir. 1983)] while another court has said that in order for a union's interpretation of its constitutional language to be considered reasonable it must be interpreted in a fashion which gives every word in its text

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[7] *O'Neill v. Airline Pilots Association, International*, 939 F.2d 1199, 1206-1207 (5th Cir. 1991); and *Motion Picture & Video Tape Editors Guild, Local 776 v. International Sound Technicians, Local 695*, 800 F.2d 973, 975 (9th Cir. 1986).

[8] [*Dole v. United Automobile, Aerospace and Agricultural Implement Workers of America* (supra at p. 1566); *Maher v. International Brotherhood of Electrical Workers*, 15 F.3d 711, 714 (7th Cir. 1994)].

operative effect [See *Reich v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 32 F.3d 512, 515-516 (11th Cir. 1994)].

Still other courts have deferred to a labor union's actions in furtherance of its interpretation of its constitution if there is no direct conflict between those actions and the provisions in its constitution [*Local 1052 United Brotherhood of Carpenters and Joiners of America v. Los Angeles County District Council of Carpenters*, 944 F.2d 610, 615 (9th Cir. 1991); and *Teamsters Joint Council No. 42 v. International Brotherhood of Teamsters*, 82 F.3d 303, 306 (9th Cir. 1996)].

Although there is an established federal policy of judicial deference to labor unions in the interpretation of their bylaws and constitutions it is apparent that deference is not limitless in scope. It is equally apparent that the federal courts have not employed consistent standards and criteria for determining when and under what circumstances judicial deference toward a labor union's interpretation of its constitution is warranted.

While labor unions should have the freedom and flexibility to engage in the management and operation of their internal affairs without being unnecessarily second-guessed by the courts, it is equally important that members of labor unions be entitled to expect that their officials will not disregard the union's laws.

Such an entitlement would be hollow if through judicial deference a labor union is effectively permitted to ignore or disregard their laws. In the interest of developing a sound, cohesive and uniform federal labor policy it is worthwhile that appropriate and uniform

criteria be established in determining when deference should be given to a labor union's interpretation of its constitution and bylaws.

THE COURT OF APPEALS EFFECTIVELY SANCTIONED A LABOR UNION'S ACTIONS IN DISREGARDING THE PROVISIONS OF ITS CONSTITUTION.

The Court of Appeals concluded that the Respondent's actions in determining the manner in which the productivity fund buyout proposal would be ratified were an outgrowth of a reasonable interpretation of its constitution for two reasons neither of which can withstand scrutiny.

First, it concluded that the productivity fund buyout proposal represented a "hybrid agreement" rather than a "system agreement" and thus Article 85 of the Union's constitution was inapplicable to the ratification process [A1]. Hence it concluded that the Respondent's actions in allowing the proposal to be ratified by submajorities was reasonable. There are two inherent flaws with its analysis.

In the first place, to the extent that the productivity fund buyout proposal was in fact a "hybrid agreement" and ratification of that type of agreement was not contemplated by the Respondent's constitution the Respondent did not entrust the determination of how the ratification should be undertaken to its appropriate officers. The Respondent's constitution has a specific mechanism for determining matters which were not clearly addressed by its terms. Article 38 of its constitution provided that the International President with approval of its Board of Directors is empowered to take such

action in those circumstances as is deemed necessary to protect the interest of both the Respondent and its members. That did not occur. The International President of the Respondent did not sanction the ratification method until confronted with the Petitioners' challenges and its Board of Directors never approved the ratification process. Thus, the Court of Appeals approved of conduct by the Respondent's officials who under the terms of its constitution were not entrusted with that authority.

In the second place there is a genuine issue of material fact about whether the productivity buyout proposal was a "system agreement" as contended by the Petitioners or a "hybrid agreement" as suggested by the Respondent. There was abundant evidence presented in the summary judgment proceeding developed before the District Court suggesting that the proposal was a "system agreement". The Respondent's constitution does not define the term "system agreement". According to the COMMITTEE's General Chairperson a system agreement was one which applied throughout the entire area of the COMMITTEE [A1]. The RAILWAY's proposal was intended to extend through its entire operating system including all of the operating territory encompassed within the COMMITTEE's jurisdiction. It involved a subject (the productivity fund) which had always been treated as a system agreement. The Respondent's International President in his letter to the Petitioners on December 20, 1991 characterized the buyout proposal as a "system agreement" and made no reference to it being a hybrid agreement.

This case was decided through the vehicle of summary judgment. The Petitioners' claims sounded in con-

tract and sought an award of money damages. Thus, to the extent disputed issues of fact material to the resolution of the lawsuit existed the Seventh Amendment to the constitution mandated the Petitioners' entitlement to a jury trial on those issues [*Teamsters v. Terry*, 494 U.S. 558 (1990)]. If reasonable persons applying the definition of a system agreement utilized by the COMMITTEE General Chairperson could differ as to whether the productivity buyout fund proposal was a system agreement that question is one of fact which should be left for a jury [See *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991)].

The second point made almost in passing by the Court of Appeals when it approved of the reasonableness of the Respondent's method of tabulating the vote was that the term "majority" as used in Article 85 was ambiguous and thus deference to the Respondent's interpretation was appropriate. In concluding that the term "majority" was ambiguous it is apparent from the discussion in its opinion that the Court of Appeals was not guided so much by the language which appeared in Article 85 as it was by extrinsic evidence relating to the circumstances surrounding the productivity fund buyout proposal which indicated that the value of the productivity funds varied widely from district to district. Typically, under the rules of contract construction extrinsic evidence should not be considered in construing the meaning of an unambiguous contract. The Court of Appeals, in concluding that the plan adopted by the Respondent to allow the vote to be determined by separate majorities within the various seniority districts rather than a single majority was not unreasonable, stated:

> "Article 85 does not plainly bar the Union's interpretation, and, in light of the district-by-district variation in value, it cannot be said that such an interpretation was unreasonable."

The Respondent's interpretation of the term "majority" which the Court of Appeals determined to be reasonable cannot be reconciled with the text of Article 85 of its constitution. The ratification process for a system agreement under Article 85 imposes two duties upon a general chairperson. First, he must "poll the entire membership holding seniority and working in the craft involved on the property". According to the Respondent's interpretation of the term system agreement this would necessarily include all members of affected crafts working within the jurisdiction of the COMMITTEE. Second, he must "be governed by the majority of the votes cast". The phrase "majority of the votes cast" can refer only to all of those who were polled. The meaning of the term "majority" from the language employed in Article 85 is clear and not susceptible to multiple interpretations. The interpretation approved by the Court of Appeals creates a ratification process which is not sanctioned by the text of Article 85. There is no language in that article suggesting even by implication that ratification of a system agreement could be done by sub-majorities. Hence, the Court of Appeals is effectively granting the Respondent license to interpret its constitution in a fashion which is contrary to the plain meaning of its language.

The apparent justification by the Court of Appeals for the reasonableness of the Respondent's interpretation is that because of a variance among the seniority districts with respect to the frequency of trains operating

with reduced crews it was not unreasonable to permit each seniority district to determine the fate of its productivity fund.

Thus, the determination of the Court of Appeals that the Respondent's interpretation of its constitution was reasonable was not based so much by vagaries of the language employed in the constitution, but instead upon external factors suggesting that ratification on the basis of separate seniority districts would be fair to the Respondent's members.

This goes to the heart of the question presented in this petition. There is no doubt that the Respondent's officials were opposed to the RAILWAY's productivity fund buyout proposal and felt that it was inconsistent with the interests of its membership, particularly those members who had many years of service left. It devised a tabulation mechanism which authorized each seniority district to control the fate of its productivity fund buyout proposal. In doing so, however, the Respondent's officials ignored the mandates in its constitution governing their activities in submitting such a proposal to its membership for ratification. While it cannot be said that the Respondent's actions in that respect were motivated by bad faith considerations there were two flaws in its actions. First, to the extent that the proposal was a system agreement it was ratified in a manner which cannot be reconciled with the plain meaning of the language employed in the constitution for the ratification of a system agreement. Second, to the extent the productivity fund buyout proposal was a hybrid agreement instead of a system agreement the Respondent's officials who devised the ratification mechanism were pre-

cluded under its constitution from making that determination.

While the officials of a labor union should be encouraged to pursue activities which they with sincere conviction believe serve the best interests of its members, their enthusiasm should be tempered by adherence to the clear requirements of its constitution and bylaws. Otherwise, the provisions in such documents can be meaningless and the government of a labor union would be conducted not on the basis of the rule of law, but rather upon the whim of its officials.

A member of a labor union is expected to adhere to and be bound by its bylaws and constitution. He should reasonably expect no less from its officials. To the extent its constitution prescribes methods for its internal operations a labor union should be expected to comply with that constitutional methodology. It is not an unnecessary intrusion into the internal affairs of a labor organization for the federal courts to enforce the reasonable expectations of a union member that his union will comply with the procedural requirements set forth in the compact establishing its government. When a labor union's activities are clearly inconsistent with those requirements judicial abstinence effectively renders such provisions a nullity.

CONCLUSION

For these reasons, the writ of certiorari should be issued to review the questions presented in this petition.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1836

JESSE FULK and DONALD CEARLOCK,

Plaintiffs-Appellants,

v.

UNITED TRANSPORTATION UNION,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 93-3278—**Richard Mills**, *Judge.*

ARGUED OCTOBER 27, 1998—DECIDED NOVEMBER 12, 1998

Before CUMMINGS, CUDAHY and FLAUM, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case presents the question of whether the United Transportation Union (the "Union") violated its own constitution when it required, in addition to overall majority approval, that a majority of each district approve a proposed buyout plan in order for members in that district to participate. Plaintiffs Jesse Fulk and Donald Cearlock were employees of the Norfolk & Southern Railroad (the "Railroad") and members of the Union. Since their district failed to approve the buyout plan, the plaintiffs did not receive the payments that members from districts which approved the plan received.

After unsuccessfully seeking internal union remedies,[1] plaintiffs sued the Union, alleging the voting procedure used was inherently discriminatory in violation of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §411(a), and contrary to the Union's constitution in violation of §301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185, which provides a cause of action in such cases.

This is the third time this case has appeared before this Court. The first time, we reversed the district court's denial of summary judgment on the LMRDA claim, holding the voting procedure not to be inherently discriminatory. *Fulk v. United Transportation Union*, 81 F.3d 733 (7th Cir. 1996). The second appeal concerned the district court's grant of summary judgment on the §301 claim. We held the district court took an overly restrictive view of its discretion in whether to require exhaustion of union procedures before hearing the merits and remanded to the district court for further consideration. *Fulk v. United Transportation Union*, 108 F.3d 113 (7th Cir. 1997). The district court then considered the merits of the plaintiffs' §301 claim and granted summary judgment to the Union, holding that the voting procedure did not violate the Union's constitution. *Fulk v. United Transportation Union*, 995 F.Supp. 937 (C.D. Ill. 1998). Plaintiffs appeal. We affirm.

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[1] Plaintiffs wrote a letter to International President DuBose challenging General Chairperson Thompson's decision on the voting procedures. President DuBose upheld the decision by letter. The plaintiffs then appealed to the General Committee of Adjustment, which took no action. Plaintiffs took their appeal to the Union's Board of Appeals, which determined that plaintiffs should have appealed President DuBose's letter to the Board of Directors and that plaintiffs were time-barred from pursuing such an appeal at that time.

Background

As we explained in the previous two appeals, *Fulk*, 81 F.3d at 734-735, *Fulk*, 108 F.3d at 114-115, the Union represents certain workers employed by the Railroad. These workers are grouped by the Railroad into several geographic districts, known as "seniority districts." Plaintiffs were members of the Springfield [Illinois] District. The Union membership was also divided into several, considerably larger, geographical units, known as "General Committees of Adjustment" (GCAs), which in turn embraced several seniority districts.

This dispute arose when the Union brought up a proposed modification of its agreements with the Railroad for membership vote. The "crew consist agreement," covering conductors, brakemen and yardmen, governs the size of the crew used to operate each train. The original agreement, adopted in 1984, allowed the Railroad to reduce the crew size from two brakemen and a conductor to one brakeman and one conductor as workers retired or otherwise left the Railroad's employ. The Railroad agreed at that time to share the resulting cost savings with the workers. Whenever a train ran with only two crew members, the Railroad paid $53.25 into a "productivity fund," which was credited to the workers. A separate productivity fund was maintained for each seniority district. The amount paid into each fund depended on the number of trains in that particular district which had been operated with two-member crews.

The modifications disputed here were negotiated in 1991. The two modifications were: First, the "crew consist agreement" was to be changed to allow the Railroad to operate with one-person crews when the size of the work force within a particular seniority district permitted. Second, the productivity funds were to be eliminated. In their place, the Railroad would make a one-time payment in December 1991 of $20,000 to each employee and an additional payment of $40,000 to each employee upon death, retirement or termination of employment.

The union leadership decided to implement different voting procedures for each of the two proposals. The reduction in crew size was put to an aggregate vote of all members of a particular GCA. Votes were tallied within each craft (conductor, brakeman and yardman). Acceptance of the proposal by a majority of each craft's workers was required to pass the new crew consist agreement.

The union leadership took a different approach to the productivity fund buyout. The buyout was put to an independent vote in each seniority district, with the result in each district determining the fate of that district's productivity fund. The Union justified the district-by-district voting procedure by the fact that the value of the funds varied from district to district, as did the relative proportion of older workers to younger workers. Within each district, a majority of each craft was again required to approve the proposal.

In plaintiffs' GCA, the modification to the crew consist agreement was approved by nearly two-thirds of those voting in each craft. In the Springfield district, however, the productivity fund buyout proposal failed to carry a majority among brakemen. Hence plaintiffs were unable to participate in the productivity fund buyout. They complain that the district-by-district voting procedure for the productivity fund buyout violated the Union's constitution.

Analysis

We review a district court's grant of summary judgment de novo, applying the same standards as the district court and viewing the record and all reasonable inferences to be drawn from it in the light most favorable to the nonmoving party. *Independent Construction Equipment Builders Union v. Hyster-Yale Materials Handling*, 83 F.3d 930, 932 (7th Cir. 1996).

This case concerns a dispute about the meaning of a union constitution. We defer to a union's interpretation of its own constitution so long as the interpretation is not

unreasonable. *Maher v. International Brotherhood of Electrical Workers*, 15 F.3d 711, 714 (7th Cir. 1994). "[A] union's interpretation of its own constitution, by-laws, and other promulgations is entitled to judicial deference; we must be able to call the interpretation unreasonable, perhaps even 'patently unreasonable,' before we can set it aside." *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990). This deference to a union's reasonable interpretation of its own constitution is predicated on a federal policy of noninterference in internal union affairs. *Local 657, United Brotherhood of Carpenters v. Sidell*, 552 F.2d 1250 (7th Cir. 1977). Our question then in interpreting the Union's constitution is whether the Union's construction of its own constitution is a reasonable one.

At issue in this case is the interpretation of Article 85 of the Union's constitution. It reads:

> The General Chairperson must poll the entire membership holding seniority and working in the craft involved on the property by mail referendum ballot prior to signing any system agreements and be governed by the majority of the votes cast.

Plaintiffs contend that Article 85 required the Union to put the productivity fund buyout proposal to a simple majority vote before the entire union membership within each GCA. The Union argues that Article 85 imposed no such requirement.

The dispute between the Union and plaintiffs revolves around the meanings of "system agreement" and of "majority" in Article 85. The Union contends that the productivity fund buyout proposal was not a system agreement and hence not governed by Article 85's strictures. Alternatively, the Union argues that even if the proposal was a system agreement, Article 85 does not prohibit the Union from seeking majority approval within each district as well as within each GCA. Our question, as noted above, is whether the Union's interpretation is reasonable.

The phrase "system agreement" is not defined in the Union constitution. The only definition we have comes from the deposition testimony of General Chairperson Thompson, who testified that a "system agreement" is one which applies to the entire area of a GCA. Plaintiffs do not contest this definition, but contrast a "system agreement" with a "local agreement," and argue that since the productivity fund buyout proposal was not a local agreement, it must be a system agreement. Plaintiffs buttress this argument by pointing to the method of ratification the Union chose in approving the proposal (submission to all members of the GCA) and the fact that the productivity fund buyout proposal replaced the productivity funds, which applied throughout the GCA.

The Union, by contrast, argues that the agreement was neither a "system agreement," nor a "local agreement," but a "hybrid agreement," incorporating elements of both. The "crew consist agreement" was more like a "system agreement," it argues, and the productivity fund buyout proposal resembled a "local agreement." Together these two proposals assuredly formed a "hybrid agreement." The Union therefore contends that if Article 85 does require a straight majority vote for system agreements (a proposition they dispute), it would either not apply to hybrid agreements or apply only to the "system agreement" component of a hybrid agreement, here, the "crew consist agreement," and not to the "local agreement" component which plaintiffs challenge.

The principal difficulty with plaintiffs' argument is that it rests on the premise that the Union can conclude only one of two types of agreements. Were we to agree with plaintiffs that the Union's constitution limits the kinds of agreements to these two types, it might be necessary to decide whether in fact the productivity fund buyout proposal was a "system agreement" (or allow a trier of fact to do so). However, plaintiffs point to no provision of the Union constitution which limits the Union to only two kinds of agreements, system and local, and bars so-called

"hybrid agreements." Hence we cannot say that the Union's interpretation, allowing for "hybrid agreements," is unreasonable.

Even assuming that the productivity fund buyout proposal is in fact a system agreement, it is still not clear that plaintiffs would prevail. When seeking approval of system agreements, Article 85 imposes two duties on the General Chairperson: (1) to "poll the entire membership holding seniority and working in the craft" and (2) to "be governed by the majority of the votes cast." Assuming the productivity fund buyout proposal was a system agreement, it is not clear that General Chairperson Thompson failed to comply with its strictures.

The Union argues that Thompson both polled the entire membership and was governed by a majority of the votes cast and thus complied with Article 85. While it is true that Thompson was not governed by the majority of the entire membership, the Union contends, but by majorities within each seniority district, nothing in Article 85 limits the General Chairperson to a single majority poll of the entire membership. Plaintiffs respond that "majority of the votes cast" can only reasonably be thought to modify "entire membership," and hence the voting procedures used in adopting a system agreement violated Article 85.

It is unnecessary to resolve which of the two readings of "majority" is the better one. Rather, we ask only whether the Union's interpretation is unreasonable. *Maher*, 15 F.3d at 714. Article 85 is ambiguous as to which majority must govern when the General Chairperson polls the entire membership. The value of the productivity fund buyout proposal to each district was a function of the value of the existing productivity funds, the age of the workers, and the number of reduced crews in each district. This value varied widely from district to district. In light of this variation, the Union allowed each district's participation in the plan to be governed by a majority vote within that district, rather than by a single majority vote across the entire membership. Article 85 does not plainly bar the

Union's interpretation, and, in light of the district-by-district variation in value, it cannot be said that such an interpretation was unreasonable.

The district-by-district voting procedure for the fund buyout proposal did not violate Article 85 of the Union's constitution. The judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Filed March 5, 1998]

IN THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JESSE FULK and DONALD CEARLOCK,	)	
Plaintiffs,	)	
v.	)	No. 93-3278
UNITED TRANSPORTATION UNION,	)	
Defendant.	)	

OPINION

RICHARD MILLS, District Judge:

The bottom line.

Summary judgment for the Union.

United Transportation Union (Union) represents operating craft employees of Norfolk Southern Railroad (Railroad). Jesse Fulk and Donald Cearlock are former employees of the Railroad and former members of the Union.

After much litigation—including two appeals to the U.S. Court of Appeals for the Seventh Circuit—only one issue remains in this case: Did the voting procedures used to decide whether to approve the Railroad's buyout of certain "productivity funds" violate the Union's Constitution?

I. BACKGROUND

Here's what happened. The productivity funds at issue in this case were the product of a 1984 "crew consist" agreement between the union and the Railroad. That agreement permitted the Railroad to reduce the operating crew size of each train from two brakemen and a conductor to one brakeman and a conductor as workers gradually left their jobs with the Railroad. In return, the Railroad agreed to share the resulting operating cost savings with the employees. Each time a rain operated with a reduced crew, the Railroad paid $53.25 into a so-called "productivity fund" which was maintained for the benefit of the workers.

The Railroad maintained a separate productivity fund for each of several different geographical regions known as "seniority districts". The existence of these seniority districts predated the productivity fund arrangement. Only employees with seniority in a given district could work and receive payments from the productivity fund in that district. At the end of the year, the amount reflected in each productivity fund was totaled and divided among the workers in the fund's seniority district. The benefits of the funds varied greatly because the amount of work and the frequency of reduced crew usage varied across districts.

When the Railroad proposed to buy out the productivity funds in July 1991, the proposal came in conjunction with another proposed modification of the 1984 collective bargaining agreement. The Railroad wanted to further reduce operating crew sizes to only one worker. Assuming this proposal was approved by union membership, the Railroad was prepared to buy out its

obligation to maintain the productivity funds. Under the terms of the buyout agreement, the Railroad would pay each worker $20,000 up front and an additional $40,000 upon the worker's death, retirement or termination of employment. The crew reduction proposal and the productivity fund buyout were presented to the union membership separately. The union membership would only have the option of approving the buyout if it approved the crew reduction.

The union leadership decided to employ a different voting procedure for each of the two proposals. The crew reduction proposal would stand or fall upon an aggregate vote of the entire union membership within certain subunits of the Union known as General Committees of Adjustment (GCAs). The GCAs covered geographic territories which were considerably larger than the seniority districts. Plaintiffs were members of GCA GO-719 which covered a territory known as the former Wabash Railroad territory and encompassed twelve different seniority districts. General Chairperson Kim Thompson headed GCA GO-719.

The voting procedure adopted for the productivity fund buyout proposal was markedly different. During negotiations, General Chairperson Thompson proposed, and the Railroad agreed, to allow each district the opportunity to approve or reject the proposed buyout of its productivity fund. This approach was justified by the fact that the value of each district's fund varied, as did the relative proportion of older employees to younger employees. Accordingly, the productivity fund buyout proposal would be voted on at the seniority level, allowing union members in each of the twelve districts to decide whether or not to approve the buyout of its par-

ticular fund. The union membership in Plaintiff's GCA were informed of the district by district voting procedure in advance of the voting date.

General Chairperson Thompson submitted the two proposals for a vote in late 1991. The crew reduction proposal was approved by the aggregate vote of GCA GO-719's membership. Predictably, the results of the district by district vote on the productivity fund buyout varied, each district reaching different conclusions about whether to retain or relinquish its productivity fund. Plaintiffs' district voted to retain its fund. Plaintiffs, who were near retirement, did not expect to enjoy much future benefit from their district's fund and therefore would have preferred to receive the $60,000 in buyout money.

II. SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment "should be granted if the pleadings and supporting documents show that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'" *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Courts must consider evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

III. ANALYSIS

Plaintiffs argue that the district by district vote on whether to approve the productivity fund buyout proposal violated Article 85 of the Union's constitution. That provision reads in part:

> The General Chairperson must poll the entire membership holding seniority and working in the craft involved on the property by mail referendum ballot prior to signing any system agreements and be governed by the majority of the votes cast.

Plaintiffs argue that this language required the productivity fund buyout proposal to be decided by a single vote of all union membership within the GCA, with one result governing all twelve districts. In other words, Plaintiffs contend that the productivity fund buyout agreement should have been voted on in the same manner as the crew reduction agreement. Defendant disagrees.

The question turns purely on one's interpretation of Article 85. This court must defer to the Union's interpretation of its own constitution so long as it is not unreasonable. *Maher v. Int'l Brotherhood of Electrical Workers*, 15 F.3d 711, 714 (7th Cir. 1994). *See also Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990) (a union's interpretation of its own constitution must be "unreasonable, perhaps even 'patently unreasonable,' before we can set it aside"). The reason for this deference is to avoid "heavy-handed judicial interference" with the internal affairs of unions. *Air Wisconsin*, 909 F.2d at 218.

The Court cannot say that the Union's interpretation of Article 85 is unreasonable. On its face, the provision

applies only to "system agreements". Plaintiffs point to no provision of any union instrument defining what system agreements are[1] but argue that the productivity fund buyout proposal is clearly one of them. They argue that the productivity fund buyout proposal must be a system agreement, because the original productivity fund arrangement "applied uniformly throughout the entire system". This argument is not very compelling. While the Railroad may have used the same formula to calculate its liability in different funds, the formula yielded widely divergent results because the factors determining those results (i.e., the frequency of reduced crew usage, etc.) varied widely across districts.

But Plaintiffs' position suffers from an even more fundamental flaw. According to Plaintiffs, Article 85 requires certain agreements, including this buyout agreement, to be put to a single system-wide vote leading to a single system-wide outcome for all districts. Plaintiffs fail to recognize, however, that the very terms of the buyout agreement permitted each district to decide the fate of its own fund. General Chairperson Thompson and the Railroad explicitly agreed to such a condition. In this sense, Plaintiffs should direct their complaints at the terms of the agreement itself, rather than the procedures adopted to vote on that agreement. In any case, it is difficult to see how the productivity fund agreement could possibly be a "system agreement"

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[1] According to deposition testimony from General Chairperson Thompson, the term "system" applies to the area governed by a given GCA. The term "system agreement", therefore, probably refers to an agreement which contemplates some application throughout such a geographic area. Beyond this level of generality, however, the Court is without guidance.

within the meaning of Article 85; if Article 85 requires a voting procedure which leads to a single outcome, it would be absurd to apply that provision to an agreement which itself presupposes the possibility of several different outcomes.

But even if the productivity fund buyout agreement is a "system agreement" within the meaning of Article 85, the language of that provision can reasonably be read to permit district by district voting in circumstances such as these. The language requires that General Chairperson to "poll the entire membership . . . by mail referendum ballot prior to signing any system agreements and be governed by the majority of the votes cast." Here, there is no question that the General Chairperson polled the "entire membership". Nor is there any question that in each district his decision was "governed by a majority of votes cast." The only aspect of Article 85 supporting Plaintiffs' interpretation is the provision's use of the singular noun, "majority." While this drafting idiosyncrasy could be woodenly construed to require a voting procedure which entails only one majority and only one result, other reasonable interpretations exist. One could reasonably interpret Article 85 as requiring the General Chairperson to do no more than submit system agreements to some sort of majority vote in which every union member is allowed to participate.

Moreover, it is doubtful that the drafters of Article 85 intended it to apply as rigidly as Plaintiffs would apply it. Plaintiffs' interpretation would require the fate of all productivity funds to be decided in one fell swoop, even though the buyout price was not linked to individual fund values—values which varied drastically across dis-

tricts. The Railroad did not insist that the buyout take place on an all or nothing basis and this Court can think of no reason why the drafters of the Union's constitution would have mandated such an inflexible result. The Union's constitution does not even mention productivity funds, and its authors probably never anticipated the kind of district-specific agreement at issue here. The Seventh Circuit has more than once refused to interfere with a union's decisions in reacting to such unanticipated situations, even where the language union's constitution seemed to afford less flexibility than the language at issue here. *See, e.g. Maher*, 15 F.3d at 714 (refusing to interfere with union officer's conclusion that a constitution provision did not apply during a local union's trusteeship because the constitution did not address the issue of administering a trusteeship); *Air Wisconsin*, 909 F.2d at 217-218 (dismissing language in union policy statement and union constitution as "preambular" and refusing to apply it during airline merger when constitution did not even mention airline mergers). The Union's constitution is a "flexible instrument," and entrusts union officers with broad authority to protect the interests of union membership. *Allen v. United Transportation Union*, 964 F.2d 818, 820 (8th Cir. 1992) (interpreting United Transportation Union's constitution); *Famulare v. United Transportation Union*, 639 F.Supp. 965, 969 (S.D.N.Y. 1986) (same).

In conclusion, this Court must defer to the Union's interpretation of its constitution because that interpretation was not unreasonable. The union, therefore, is entitled to summary judgment.

CONCLUSION

Ergo, Defendant's motion for summary judgment[2] is ALLOWED.

ENTER: 4 March, 1998.

FOR THE COURT:
/s/ Richard Mills
United States District Judge

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[2] Because of the procedural posture of this case, the Court ordered the parties to rebrief Defendant's original summary judgment motion. At that time, the original motion was nearly three years old. Rather than resurrecting this long-dead motion, the Court will treat Defendant's rebriefing as the new motion for summary judgment.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 12, 1999

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

JESSE FULK and DONALD CEARLOCK,

Plaintiffs-Appellants,

No. 98-1836 v.

UNITED TRANSPORTATION UNION,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 93-3278—**Richard Mills**, *Judge*.

ORDER

On consideration of the Petition for Reconsideration with Suggestions for Reconsideration in Banc filed by plaintiffs-appellants on January 27, 1999, all of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.